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09/710,489	11/10/2000	Kenneth A. Honer	S99-190	5331

7590

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EXAMINER

VU, DAVID

ART UNIT

PAPER NUMBER

2818

DATE MAILED: 04/12/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/710,489

Applicant(s)

HONER, KENNETH A.

Examiner

DAVID VU

Art Unit

2818

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 28 January 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-41 is/are pending in the application.
- 4a) Of the above claim(s) 25-41 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 10 November 2000 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

## **DETAILED ACTION**

### ***Election/ Restriction***

1. Application's election without traverse of Species I (Claims 1-24) in Paper No.5 is acknowledge.

### ***Claim Rejections - 35 USC § 112***

2. Claim 16 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. It is not clear what the phrase "wherein said correlated curvature essentially reduces with the square of an increase of the variable sputtered layer thickness for constant remaining first sputtering criteria."

Due to the indefiniteness of the claim, no prior art will be applied to this claim at this time.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

3. Claims 1-3, 6-8, 10, 12-13, 16-17 and 23-24 are rejected under 35 U.S.C. 102(e) as being anticipated by Howe et al.,(US 6,210,988).

In re claim 1, Howe et al, in related text disclose a sputtered silicon structure being positioned on a work piece together with an operational circuitry (Col. 3, Lines. 1-9) and being formed on top of a sacrificial layer, sputtered silicon structure having a thermal fabrication budget, operational circuitry having a first critical thermal budget, wherein thermal fabrication budget is smaller than first critical thermal budget.(See Table. 1 and Col. 1, Line. 67-Col. 2, Line. 67)

In re claim 2, Howe et al, in related text disclose a sputtered silicon structure being formed on top of a sacrificial layer, sputtered silicon structure having a thermal fabrication budget, sacrificial layer having a second critical thermal budget, wherein thermal fabrication budget is smaller than second critical thermal budget.(See Table. 1 and Col. 1, Line. 67-Col. 2, Line. 67)

In re claim 3 and 6, wherein sacrificial layer is made from a material dissolvable by a wet-or dry etchant.(Col. 5, Lines. 35-53)

In re claim 10, wherein operational semiconductor circuitry includes an aluminum-metalization. (Col. 2, Lines. 29-39)

In re claims 12-13, wherein said released structure has an essentially buckling-free deformation configuration.(Fig. 7)

In re claim 17, wherein released element has an essentially buckling-influenced deformation configuration.(Fig. 7)

In re claims 4-5, 9, 11, 14-15 and 18-22, the limitation "wet etchant is selected from..." or "wherein said sputtered silicon structure comprises a post annealing ..." or " a maximum annealing temperature..." or " first sputtering criteria..." is taken to be a product by process limitation and consider non-limitation. In a product-by-process claim, it is the patentability of the claimed product and not of the recited process steps which must be established. Therefore, when the prior art discloses a product which reasonably appears to be identical with or only slightly different than the product claimed in a product-by process claim, a rejection based on sections 102 or 103 is fair. The Patent Office is not equipped to manufacture products by a myriad of processes put before it and then obtain prior art product and make physical comparisons therewith. In re Brown, 173 USPQ 685 (CCPA 1972). Also, a product by process claim directed to the product per se, no matter how actually made, In re Hirao, 190 USPQ I S at 17 (footnote 3). See In re Fessman, 180 USPQ 324, 326 (CCPA 1974); In re Marosi et al., 218 USPQ 289, 292 (Fed. Cir. 1983); and particularly In re Thorpe, 227 USPQ 964, 966 (Fed. Cir. 1985), all of which make it clear that it is the patentability of the final structure of the product "gleaned" from the process steps, which must be determined in a " product by process" claim, and not the patentability of the process. See also MPEP 2113. Moreover, an old and obvious product produced by a new method is not a patentable product, whether claimed in "product by process"

claims or not.

Note that a "product by process" claim is directed to the product per se, no matter how actually made, *In re Hirao*, 190 USPQ 15 at 17 (footnote 3). See also *In re Brown*, 173 USPQ 685; *In re Luck*, 177 USPQ 523; *In re Fessmann*, 180 USPQ 324; *In re Avery*, 186 USPQ 161; *In re Wertheim*, 191 USPQ 90 (209 USPQ 554 does not deal with this issue); *In re Marosi et al*, 218 USPQ 289; and particularly *In re Thorpe*, 227 USPQ 964, all of which make it clear that it is the patentability of the final product per se which must be determined in a "product by process" claim, and not the patentability of the process, and that an old or obvious product produced by a new method is not patentable as a product, whether claimed in "product by process" claims or not. Note that applicant has the burden of proof in such cases, as the above caselaw makes clear.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 7-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over *Howe et al.*, (US 6,210,988) in view of *Yao* (US 5,578,976).

Howe et al. teaches all the limitations of the claims, but merely specifies that the sacrificial layer is made from an organic material such as polyimide. Yao, in related text (Col. 5, Lines. 18-19) disclose polyimide is used as the preferred sacrificial material. The use of conventional materials to perform their known functions in a conventional process is obvious. (In re Raner 134 USPQ 343 (CCPA 1962). Furthermore, as chemical composition of the protective layer does seem to be critical to the invention, it must be shown that any one or all of the listed materials yield an unexpected product or result. In re Margolis 228 USPQ 940 (Fed. Cir. 1986); In re Kirsch 182 USPQ 286 (CCPA 1974); In re Suether 181 USPQ 36 (CCPA 1974); In re Costello 178 USPQ 290 (CCPA 1973); In re Von Schickh 150 USPQ 300 (CCPA 1966); In re Sussman 60 USPQ 538 (CCPA 1944); In re Kaplan 45 USPQ 175 (CCPA 1940).

5. Claims 23-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Howe et al., (US 6,210,988) in view of Mitchell (US 5,573,679).

Howe et al., disclose all claimed subject matter, but fails to expressly disclose the core layer and the conductive layer material. Mitchell et al., in related text, (Col. 4, Lines. 18-25) disclose wherein core layer includes silicon and conductive layer is sputtered from a material selected from a group consisting of TiN; and core layer having a first dissolving characteristic being compatible to a second dissolving characteristic of said at least one conductive layer. However, given the substantial Howe et al., in view of Mitchell, it would have been obvious to one with ordinary skill in the art at the time of the invention to allow the use of CVD processes throughout microphone fabrication.

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### Conclusion

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to David Vu whose telephone number is (703) 305-0391. The examiner can normally be reached on Monday-Friday from 8:00am to 5:00pm.

If attempt to reach the examiner by telephone are unsuccessful, the examiner's supervisor, David Nelms., can be reached on (703) 308-4910.

David Vu DV

Art Unit 2818

HVA  
Hoi V. Ho  
primary Examiner  
Art Unit 2818